

CASE UPDATES FOR JANUARY 2005

I. Recent Published Opinions

A. The 10th Circuit Seemingly Changes Course Regarding the Res Judicata Effect of Language in a Chapter 13 Plan

The Court concluded that language in a Chapter 13 Plan that stated that the student loan “shall be deemed discharged in its entirety upon completion of the Plan” was inadequate to make the student loan dischargeable because the Plan did not include a finding of “undue hardship.” The failure to challenge the Order confirming the Plan did not matter and the issue was not res judicata on the order of confirmation since the Plan did not include a finding of undue hardship. Implicit throughout the opinion and expressly in footnote 2, the Court indicated that it did not agree with the case *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999). In *Andersen*, the Tenth Circuit held that where a Chapter 13 Plan includes an express finding of undue hardship, then the student loan is discharged.

Poland v. Educational Credit Mgmt. Corp. (In re Poland), 382 F.3d 1185 (10th Cir. 2004).

In three cases handed down, almost sequentially from the Tenth Circuit B.A.P., the Court held that, under *Poland v. Educational Credit Management Corp. (In re Poland)*, 385 F.3d 1185 (10th Cir. 2004), a confirmed plan stating that a student loan debt is discharged will not discharge such debt, unless the plan makes an express finding of undue hardship.

Educational Credit Management Corp. v. Nelson (In re Nelson), 318 B.R. 532 (10th Cir. BAP December 14, 2004) and

Educational Credit Management Corp. v. Seiwert (In re Seiwert), 2004 WL 2896942 (10th Cir. BAP December 14, 2004)[unpublished] and

Educational Credit Management Corp. v. Boyer (In re Boyer), 2004 WL 2896940 (10th Cir. BAP December 14, 2004)[unpublished].

But, in a post-confirmation modification to a plan, a student loan creditor failed to object to an express finding in the modified plan that the student loan was an undue hardship. Thus, the student loan would be discharged consistent with *Poland v. Educational Credit Management Corp. (In re Poland)*, 385 F.3d 1185 (10th Cir. 2004). *Mersmann* notes that sanctions can be imposed against counsel for including an undue hardship finding in a Chapter 13 Plan, rather than seeking such a finding through an adversary proceeding.

Educational Credit Management Corp. v. Mersmann, 318 B.R. 537 (10th Cir. BAP December 14, 2004).

B. Sovereign Immunity

The Court concluded that it would be extraordinarily unfair to the United States if the mere filing of a proof of claim in a bankruptcy proceeding subjected it to liability for untimely claims under the Federal Tort Claims Act ("FTCA"), leaving it without recourse to the usual protections from stale claims available to it in any other, non-bankruptcy proceeding. The 1994 amendments to 11 U.S.C. § 106 added a statement in subsection (a)(5), that Section 106 did not create any substantive claim for relief or cause of action, and that any substantive rights asserted thereunder must have an independent legal basis. Thus, even though the Debtor may avail itself of the waiver of immunity in Section 106, the FTCA remains the exclusive means by which it may assert its alleged tort claims, with the FTCA's attendant statute of limitations contained in 28 U.S.C. § 2401(b). Congress did not manifest an intent in Section 106 of the Bankruptcy Code to displace 28 U.S.C. § 2401.

Franklin Savings Corp. v. United States (In re Franklin Savings Corp.), 385 F.3d 1279 (10th Cir. 2004).

C. Preferences and Application of New Value Exception

A debtor, a grocery chain, returned cookies, crackers and other food products, delivered to the debtor by a creditor. The products were delivered and returned during the preference period. The products had significant value when delivered, but no value at the time of their return. In analyzing whether this constituted a preference and whether the new value defense under 11 U.S.C. § 547(c)(4)(B) is defeated, the Court concluded that "new value is given at the time goods are shipped or delivered to a debtor." The court then reasoned that the new value defense is defeated if, after the receipt of the new value, the debtor made a transfer to the creditor that would be avoidable and concluded that the return of the product was not avoidable for one simple reason: at the time of [the products'] return, to [creditor], the goods had no value. A transfer of valueless property is not an avoidable transfer." (emphasis in the original)

Gonzales v. Nabisco (In re Furr's Supermarkets, Inc.), 317 B.R. 423 (B.A.P. 10th Cir. Nov. 24, 2004).

D. Proper Service and Jurisdiction

Creditor obtained a default judgment against a debtor/defendant making a preliminary injunction permanent and imposing a sanction on the debtor/defendant. Debtor/defendant appealed asserting that the default judgment is void and should be vacated because the original complaint was not properly served. Plaintiff served the debtor/defendant by mail, certified first class, at his address on record with the bankruptcy court. Debtor defaulted and judgment was entered against him in the

bankruptcy court. Debtor/defendant asserted that because the address of record was not his homestead service was not proper. The BAP concluded that service was proper as service on the address of record complied with Fed.R.Bankr.P. 7005 and Fed.R.Civ.P. 5(b)(2)(B) and the debtor/defendant did not ask that mailings/service be made elsewhere.

Saffa v. Wallace (In re Wallace), 316 B.R. 743 (B.A.P. 10th Cir. Nov. 1, 2004).

E. Extensions of Time under Fed.R.Bankr.P. 4007(c)

Judge Romero enumerated standards for adjudicating a creditor's request for an extension of time to file a complaint objecting to the dischargeability of a certain debt. The Court found that Fed.R.Bankr.P. 4007(c) provides only that the time deadline for the filing of a § 523 complaint may be extended "for cause." The only other requirement is that it be filed before the time for filing the complaint has expired. The determination of "for cause" is "by its very nature ... fact driven and thus, must be analyzed on a case by case basis." The Court noted that some courts have considered a number of non-exclusive factors in determining "for cause" including: (1) whether the Debtor refused in bad faith to cooperate with the creditor, (2) whether the creditor had sufficient notice of the deadline and the information to file an objection, (3) the possibility that the proceedings pending in another forum will result in collateral estoppel on the relevant issues, (4) whether the creditor exercised due diligence, and (5) the complexity of the case.

In re Stonham, 317 B.R. 544 (Bankr.D.Colo. 2004).

F. Property of the Estate

The Chapter 7 trustee moved for turnover of a real estate sales commission received by the debtor postpetition but which was related to a prepetition sale contract. The Court found that the commission was property of the estate because it was earned prepetition. The Court rejected the debtor's contention that the full value of the commission did not become property of the estate because many unsatisfied contingencies existed with respect to the sale contract on the petition date.

In re Ruetz, 317 B.R. 549 (Bankr.D.Colo. 2004).

G. Dischargeability under § 523(a)(4)

Creditors, a general contractor and owner in the construction of an apartment complex, brought an adversary proceeding against a debtor, a principal in a defunct corporation that was the subcontractor on the project for foundation concrete, seeking a

determination that their claim against the debtor was nondischargeable under § 523(a)(4). The Court concluded that, under the Colorado mechanic's lien trust fund statute, there exists no fiduciary relationship between the parties. Specifically, that because the express language of Colo.Rev.Stat. § 38-22-127(1) does not mention "owners" or "general contractors" and therefore these parties are not covered by the statute and no fiduciary relationship exists under § 523(a)(4). *This case goes against the majority of cases in this district on the subject.*

Tri-C Construction Co. v. Walker (In re Walker), 315 B.R. 595 (Bankr.D.Colo. 2004).

H. Chapter 13 Eligibility

Judge Tallman concluded that punitive/treble damages, available to Plaintiffs in pending unadjudicated state court litigation or adversary proceedings in a prior, but still open Chapter 7 case, must be considered in the eligibility calculation under § 109(e). Claims are not "contingent" for purposes of the Chapter 13 eligibility calculation, when all of the events giving rise to liability occurred pre-petition. In deciding that the award or treble damages under Colorado's civil theft statute, C.R.S. § 18-4-405, was not contingent, Judge Tallman relied heavily on the conclusion, that the award of treble damages under the statute was mandatory, not discretionary. Moreover, a debt is liquidated where it is capable of being readily ascertained, even if a debtor disputes the debt. Because the debtor had noncontingent, liquidated, unsecured debt in excess of the § 109(e) debt limits, he was not eligible for Chapter 13 relief.

In re Krupka, 317 B.R. 432 (Bankr.D.Colo. 2004).

I. Claims

In a matter of apparent first impression in this District, the Court considered an objection filed by a Chapter 7 Trustee to an undersecured creditor's claim for postpetition interest at the contract rate and an award of postpetition attorney fees. The objection by the Trustee argued that 11 U.S.C. § 502(b)(2) precluded postpetition interest as it is for "unmatured interest." The Court agreed that a bare reading of section 502(b)(2), alone, would seem to suggest that postpetition interest must be disallowed. However, the Court analyzed section 502(b)(2) in conjunction with sections 726(a)(5) and (a)(6) and existing persuasive, but not controlling, case law. The Court determined, under the three factors set forth in *In re Kentucky Lumber Co.*, 860 F.2d 674, 677 (6th Cir. 1988), that where: (1) the debtor proves solvent, (2) the collateral produces a return, and (3) the collateral is sufficient to pay interest as well as the principal of the claim, interest can be allowed. The Court further added that two additional factors could also be considered here. These two additional factors were that: (1) the creditor assisted substantially in the recovery of undisclosed assets from a dishonest debtor and (2) the debtor did not object to the claim of the creditor. The Court

further concluded that interest, under the specific circumstances of this case, should be the contract rate of interest. Moreover, the Court concluded that the Bank is entitled to attorney's fees in accordance with its contract with the debtor under the reasoning of *In re New Power Company*, 313 B.R. 496 (Bankr.N.D.Ga. 2004).

In re Fast, 318 B.R. 183 (Bankr.D.Colo. 2004).

II. Unpublished Opinions of Note

A. Repeat Filers

In a case involving a frequent filer, the Court determined that it may not impose a filing ban greater than 180 days as specified under 11 U.S.C. § 109(g), citing *Frieouf v. Farm Credit Bank (In re Frieouf)*, 938 F.2d 1099, 11103-1104 (10th Cir. 1991). Consequently, the Court only imposed a filing ban of 180 days. The Court further concluded that the debts listed in Debtor's current and previous bankruptcy schedules, in accordance with 11 U.S.C. § 349(a), are excepted from discharge in any future bankruptcy proceeding for a period of three years from the date of the hearing on the matter. In addition, in accordance with 11 U.S.C. § 523(a)(17), unpaid filing fees owed to the bankruptcy court are not dischargeable in any future cases the debtor may file.

In re Wappes, 2004 WL 2714382 (Bankr.D.Colo. Nov. 10, 2004).

B. Disinterestedness

Counsel sought employment as Debtor's counsel in a Chapter 11 case. Counsel disclosed that it received a \$25,000 retainer from "an affiliate of the Debtor" which turned out to be the sole member of the Debtor LLC. In addition, counsel stated that it presently represents a bank creditor of the Debtor and a gentleman "who may be an insider of the Debtor..." The parties whom the firm represented agreed to waive any conflict or potential conflict, provided that the firm cannot represent a party seeking affirmative relief against them. After a status and scheduling conference in the Chapter 11 case, the Court requested further disclosures and definitions regarding the relationships of the parties and the law firm. The original application and amended application and disclosures did not reveal, fully, that the bank was owed \$1.1 million at the time of filing and that it was owned by a trust, the sole beneficiary of which was the aforementioned man "who may be an insider of the Debtor" who owned 50% of a corporation which owns 80% of the outstanding shares of the sole member of the Debtor LLC. Disclosures were also not forthcoming that the sole member of the Debtor LLC was also a co-obligor on the loan to the bank and that this sole member also may be liable for significant tax debt of the Debtor. The Court concluded that the variety of important and consequential connections with parties who are integral to and somewhat

inseparable from the Debtor was not fully disclosed and that counsel was not disinterested.

In re EZ Links Golf, LLC, 2004 WL 2850034 (Bankr.D.Colo. 2004).